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IN THE

Supreme Court of the United States

October Term, 1964

No. 360

T. J. MARSHALL, *et al.*,

Petitioners,

v.

MAYOR and BOARD OF SELECTMEN OF THE CITY OF McCOMB, MISSISSIPPI,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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MAYOR and BOARD OF SELECTMEN OF THE CITY OF McCOMB, MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioners pray for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered on February 1, 1965, in the above-entitled cause.

Opinion Below

The opinion of the Supreme Court of Mississippi is reported at 171 So. 2d 347 and is appended hereto, *infra*, at page 1a.

Jurisdiction

A judgment affirming the Chancery Court of Pike County by the Supreme Court of Mississippi was entered on February 1, 1965. A Suggestion of Error on behalf of petitioners was overruled by that court on March 15, 1965. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28, United States Code, § 1257(3). Application for

an extension of time to file this petition to and including July 19, 1965 was granted in an order issued by Mr. Justice Black dated June 27, 1965.

Questions Presented

1. Whether an ordinance which disenfranchises Negro citizens by removing them from the confines of a municipality is consistent with the Fifteenth Amendment and the Fourteenth Amendment's due process and equal protection clauses.

2. Whether Negro citizens, who are required by the court to try a racial discrimination case in a segregated courtroom are accorded that impartial administration of justice and due process of law mandated by the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

1. This case involves the Fifteenth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following Sections of the MISSISSIPPI CODE OF 1942, ANN. TITLE 16.

§ 3374-10. Extension or contraction of corporate boundaries.

The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory which it is proposed to include in or exclude

from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall general terms describe the proposed improvements to be made in the annexed territory and the manner and extent of such improvements and the approximate time within which such improvements are to be made, and such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby.

§ 3374-11. Proceedings in chancery court.

When any such ordinance shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located. Provided, however, that when a municipality wishes to annex or extend its boundaries across and into an adjoining county such municipal authorities shall file a petition in the chancery court of the county in which such territory is located, which said petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement or contraction of the municipal boundaries, as the case may be, shall be ratified, approved and confirmed by the court. There shall be attached to such petition, as exhibits thereto, a certified copy of the ordinance adopted by the municipal authorities and a map or plat of the municipal boundaries as they will exist in event such enlargement or contraction becomes effective.

§ 3374-12. Hearing on petition.

Upon the filing of such petition and upon application therefor by the petitioner, the chancellor shall fix a date certain, either in term time or in vacation, when a hearing

on said petition will be held, and notice thereof shall be given in the same manner and for the same length of time as is above provided with regard to the creation of municipal corporations, and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction. It is expressly provided, however, in all cases of the enlargement of municipalities where any of the territory proposed to be incorporated is located within three miles of another existing municipality, then such other existing municipality shall be made a party defendant to said petition and shall be served with process in the manner provided by law, which process shall be served at least thirty (30) days prior to the date set for the hearing.

§ 3374-13. Decree of chancellor.

If the chancellor finds from the evidence presented at such hearing that the proposed enlargement or contraction is reasonable and is required by the public convenience and necessity and in the event of an enlargement of a municipality, that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time, the chancellor shall enter a decree approving, ratifying and confirming the proposed enlargement or contraction, and describing the boundaries of the municipality as altered, but in so doing the chancellor shall have the right and the power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from such municipality, as the case may be. If the chancellor shall find from the evidence that the proposed enlargement or contraction, as the case may be, is unreasonable and is not required by the public convenience and necessity, then he shall enter a decree denying such enlargement or contraction. In any event, the decree of the chancellor shall become effective after the passage of ten (10) days from the date thereof or, in

event an appeal is taken therefrom, within (10) days from the final determination of such appeal. In any proceeding under this section the burden shall be upon the municipal authorities to show that the proposed enlargement or contraction is reasonable.

§ 3374-14. Appeal.

If the municipality or any other interested person who was a party to the proceedings in the chancery court be aggrieved by the decree of the chancellor, then such municipality or other person may prosecute an appeal therefrom within the time and in the manner and with like effect as is provided above in the case of appeals from the decree of the chancellor with regard to the creation of a municipal corporation.

Statement of Facts

On September 27, 1960, pursuant to Mississippi Code of 1942, Ann. § 3374-10, the Mayor and Selectmen of McComb, Mississippi adopted an ordinance, subsequently approved by the court, which provided for annexation of approximately 1100-1200 acres of land (R. 56, 101). The ordinance stated in part that "[T]he City of McComb City proposes to furnish water and sewerage facilities within the added territory and will extend such services when requested by occupants of said territory" (R. 48, 51). Less than three years later, on August 30, 1963, this same governing body, again acting under the authority of the same statute, approved a similar ordinance contracting municipal boundaries to exclude from the city over 300 acres (R. 56, 101). The deannexed portion is predominately Negro and the area of residence of petitioners (R. 116, 123, 129, 131).

In compliance with procedure set forth in § 3374-11, Mississippi Code of 1942, Ann., which requires judicial confirmation of municipal boundary changes, the city filed its petition on December 9, 1963. Petitioners, all of

whom are Negro, filed objections and a hearing before the Chancery Court followed.

At the commencement of the hearing, petitioners requested and then moved the court to desegregate the courtroom and to order the sheriff to cease segregating spectators in the courtroom according to race, urging that such segregation constituted an abridgment of due process under the Fourteenth Amendment to the United States Constitution. The court summarily overruled the motion (R. 47).

The city proceeded on the thesis that financial inability to afford sewage and water services for the area involved, validated the deannexation ordinance (R. 50, 60). Despite the contention of economic hardship, the record reflects that in the past the city had floated bond issues in order to provide requisite municipal services (R. 69, 107-08); since the 1960 annexation the city had made no similar attempt to secure additional funds for such capital improvements. Moreover, the city had decreased property taxes (R. 68). The city's water department, which was operating at a deficit at the time of the 1960 annexation (R. 74, 112), had been put on a self-sustaining basis since that time (R. 113). Although the 1960 annexation ordinance had provided that water and sewage service would be provided "when requested by occupants" of the annexed area, petitioners stipulated that they were more than willing to wait for these services in order to retain their status as citizens of McComb (R. 118, 125, 133).

Municipal provision of sewage facilities throughout the city is, at best incomplete (R. 103-104). While there was testimony that the extension of these facilities to the deannexed area would be expensive, the record is barren of evidence of any plan or intention to provide water and sewage to this area or to unsupplied areas within the city limits, and to incur incident expenses which might burden original McComb citizens.

In one instance, an undeveloped section of McComb, admittedly viewed as a potential white residential area, was provided with sewage services before construction of any buildings in the area had begun (R. 102). However, no municipal sewage service had been supplied in older areas of the city which are admittedly primarily Negro (R. 57, 103).

In addition to losing police protection, refuse collection services and street maintenance provided by the municipality (R. 116, 123, 132, 138, 139), a substantial portion of the city's Negro population is disenfranchised by being separated from McComb (R. 116, 123, 131). White members of this community are primarily on commercial property and consequently reside elsewhere (R. 78-79). McComb is of political significance in Pike County since more than 40% of the entire county population are within city limits (R. 33).

In support of the contention that deannexation constituted a denial of their right to vote guaranteed under the Fifteenth Amendment to the Constitution, it was demonstrated that the Negro community in the disputed area had manifested an increased desire to secure their constitutionally protected voting rights (R. 126, 133, 140). Especially, intensified efforts were begun during 1961, approximately one year after the approval of the original ordinance (R. 126, 140). Voter registration classes were being held and the Negro community was instruted regarding qualifying for registration (R. 134, 143). As a result, Negroes had been registered; moreover the registration drive is still in effect (R. 127, 133, 142-143).

On February 3, 1964, under authority of § 3374-13 of Missisippi Code of 1942, Ann., the Chancery Court of Pike County found that the ordinance adopted by the city was reasonably based and therefore confirmed it, stating that " . . . there is no foundation for [the] attempt . . ." to inject the race issue in this case" (R. 147). Pursuant to Mississippi Code of 1942, Ann., § 3374-14, peti-

tioners appealed to the Mississippi Supreme Court, which affirmed the lower court's holding. Petitioners subsequently filed a suggestion of error which was overruled by the Mississippi Supreme Court on March 15, 1965. On June 7, 1965, this Court extended the time to file this petition to July 19, 1965.

In their objections to the petition in the Chancery Court and before the court below, petitioners contended that confirmation of the ordinance by the Chancery Court and the ordinance itself constituted a denial of equal protection and due process of law guaranteed by the Fourteenth Amendment; that the judgment of the court deprived petitioners of property without due process of law and that it discriminated against petitioners contrary to the equal protection clause and deprived petitioners of rights guaranteed by the Fifteenth Amendment. Further, before the Supreme Court and again in the Suggestion of Error, it was contended that the finding of reasonableness as within the statute was neither justified nor supported by the record. All questions raised herein were preserved on appeal to the court below (R. 26-30, 115, 143, 151-152, 168-173). The segregated courtroom as a denial of due process and equal protection of the law contrary to the Fourteenth Amendment was raised at the commencement of the hearing; this issue preserved on appeal (R. 47, 151). Motions directed to denial of rights made at the conclusion of the City's case were similarly overruled and the issues preserved on appeal (R. 115, 151-152, 168-173).

Reasons for Allowance of Writ

1. The decision of the court below is in direct conflict with principles established by *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), by *Johnson* v. *Virginia,* 373 U. S. 61 (1963) and contravenes petitioners' Fifteenth Amendment right to vote as well as their Fourteenth Amendment rights to equal protection and due process of law. Under *Gomillion*

it is settled that neither by indirect means nor through acts apparently valid may a state deprive Negro citizens of their right of enfranchisement. Moreover, the decision below emanates from proceedings conducted in a segregated courtroom, where that segregation is not only condoned but enforced by the judiciary, in clear denial of petitioners' right to due process of law.

By a narrow interpretation of the function of judicial confirmation of an ordinance contracting municipal boundaries and a finding that the ordinance is valid because "reasonable," the court below ignored and sought to obscure the unavoidable, unconstitutional effect of the ordinance. The deannexation ordinance in dispute cannot be viewed as resulting from a purely economic decision concerning the fiscal operations of a municipality. Rather, the validity of the ordinance must be determined by viewing it in its total context and evaluating reasonableness with reference to the record and the ultimate effect of the municipal legislation involved. The record below shows that Negro voter registration drives in McComb were initiated in 1961, approximately one year after the annexation ordinance brought these Negroes into McComb (R. 126).

Although this Court does not make an independent review of evidence which a state court has found sufficient to establish compliance with a state statute, this rule is inapplicable where the effect of the court's decision allows a state to practice and to protect the practice of racial discrimination. As was pointed out recently in *McLaughlin* v. *Florida*, 379 U. S. 184 (1964), where the acts of a local government conflict with rights guaranteed by the Fourteenth Amendment, the state must do more than show that its action is "rationally related to the accomplishment of a permissible state policy." Here, the state court required the city to do even less. This Court has consistently struck down all attempts, no matter how "ingeniously or ingenuously," manipulated to deprive Negro citizens of

their right to vote whether attempted through the blatantly obvious "grandfather clauses" *Guinn* v. *United States* (1915), 238 U. S. 347; the more sophisticated white primaries *e.g. Myers* v. *Anderson,* 238 U. S. 368 (1915); *Smith* v. *Allwright,* 321 U. S. 649 (1944); or, more recently, the use of districting to disenfranchise Negroes *Gomillion* v. *Lightfoot, supra.* The effect of the deannexation is undisputed; the ordinance terminates the municipal citizenship of an overwhelmingly Negro community, at a time when that community, like so many Negro communities throughout the state, was encouraging its members to register and vote and increasing the number of registered Negro voters. The recitation in the deannexation ordinance of the grounds for contracting the city's boundaries *i.e.*:

> . . . it has become evident that the facilities offered the residents of this excluded area cannot be furnished within a reasonable time as was indicated when this area was incorporated within the City, April 29, 1961. That if the said City attempted to provide water and sewer facilities in addition to fire, police protection, garbage collection, and other municipal facilities, all of the citizens of the City would be unduly burdened, and that public convenience and necessity is required and would be served by the contraction of the City limits as proposed herein.

does not obscure a purpose to effect disenfranchisement.

The record shows the speciousness of this ground. Less than three years earlier, when the city had incorporated this area and an additional 900 acres into its corporate limits, its selectmen had shown an awareness of the difficulties involved in supplying water and sewage services to the newly acquired territory by providing in the ordinance:

> . . . the City of McComb City proposes to furnish water and sewerage facilities within the added territory and will extend such services *when requested by occupants* of said territory. (R. 51)

Petitioners have not requested these services, but have stipulated that they are willing to forego them for an unspecified time so that they may retain their valued municipal citizenship (R. 118, 125, 133, 140). Initially then, the basis upon which the city relies for support of deannexation is, on its face, inconsistent with the terms upon which the annexation was originally undertaken. It is evident that the city was concerned only with the convenience of those remaining within municipal boundaries and not with the rights of those to be excluded. The alleged financial hardship resulting from annexation was a mere pretext for action designed to deprive the Negro of his vote since the city, prior to annexation, was continually lowering its tax rates (R. 58, 60, 67).

Since this Court's decisions in *Gomillion* and the line of cases stemming from *Baker* v. *Carr*, 369 U. S. 186 (1960), preclude the use of non-justiciability as a shield, the local officials of McComb are attempting to achieve the same result prohibited in *Gomillion*, by disguising their actions as necessary for a legitimate state purpose. However, here, as in *Gomillion*,

> while in form this is merely an act redefining metes and bounds . . . the inescapable human effect of this essay in human geography is to despoil colored citizens and only colored citizens of their theretofore enjoyed voting rights. *Gomillion* v. *Lightfoot*, 364 U. S. at 347.

Acceptance at face value of the city's claim that deannexation is desired only for economic reasons, requires that "the law . . . have the blindness of indifference rather than the blindness of impartiality" deplored by the Court in *Cassell* v. *Texas*, 339 U. S. 282 (1950).

Although the drawing of geographic boundaries is generally considered a local function it may not be used as a tool for circumventing constitutional rights. The drawing of an "uncouth 28-sided figure" such as was found in *Gomillion* was not necessary to effectuate the desired ex-

clusion of an entire Negro community from McComb. An examination of Exhibit A to the testimony of witness Burt (R. 64) shows that solely by contracting its southern boundaries the City of McComb was able to exclude "Beartown", a heavily populated community whose Negro composition is well illustrated by such street names as "Harlem", a Negro school attended by residents of "Beartown", and some undeveloped acreage owned by the City. The balance of the area annexed in 1960 will remain within the municipal boundaries for reasons upon which the record is silent.

When the ordinance is considered within the broader spectrum of the racial climate and attitudes in Mississippi, its "reasonable" nature becomes even more doubtful and the validity and importance of petitioners' contentions of constitutional deprivation more apparent.

The federal judiciary has had ample experience with the ingenuity of Mississippi in its various efforts to deprive its Negro citizens of their constitutionally-protected rights *United States* v. *City of Jackson*, 318 F. 2d 1 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F. 2d 201 (5th Cir. 1963); *Meredith* v. *Fair*, 298 F. 2d 696 (5th Cir. 1962); *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (5th Cir. 1959). Most recently, these efforts have been directed toward attempted suppression on the part of Mississippi governmental authorities of Negro participation in public affairs, specifically exercise of the franchise. *Hearings before the United States Commission on Civil Rights, Voting*, Vol. I (1965). Well documented inquiries into the voter registration statistics of Pike County including the City of McComb and of Mississippi in general, consistently reveal that these conscious efforts to deprive Negro citizens of their right to vote have been all too successful. *United States Commission on Civil Rights, Voting in Mississippi* (1965). This Court itself has recognized, deplored and prohibited this abuse of power. *United States* v. *Mississippi*, 380 U. S. 128, 156 (1965); *cf. Louisiana* v. *United States*, 380 U. S. 145 (1965).

Indeed, the 1965 voting rights bill, at this writing on the floor of Congress, is intended to forestall future attempts at disenfranchisement of Negro citizens. The intense desire of Negroes in Mississippi to exercise their franchise is dramatically illustrated by the testimony of these citizens during the recently conducted hearings held by the United States Commission on Civil Rights, *supra*, pp. 67, 71, 139. Negro residents of McComb have participated in this campaign to end Negro disenfranchisement and their efforts have been rewarded by enactment of the ordinance in question. Failure to prohibit the type of gerrymandering here attempted will open the door to a new technique for vitiating all that has been accomplished by the judiciary in the area of civil rights during the years since *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

2. In affirming confirmation of the ordinance the court below has granted protection to a device denying petitioners equal protection of the laws. The plausibility of the city's action does not survive scrutiny; deannexation is one phase of a governmental policy which denies equal protection of the laws to Negroes because of their race. The record demonstrates that the city has been lax in supplying sewage and water services to those older areas of the city which are primarily inhabited by Negroes, but that it has not been at all remiss in installing these same services in undeveloped areas, which, under the segregated housing patterns in McComb, will be white residential neighborhoods (R. 100, 102).

It is uncontrovertible that a state law or local ordinance which provided that streets be paved in white residential areas but not in Negro, that garbage collection and sewage facilities be afforded white inhabitants but not Negro, or that police patrol white areas but not Negro, would be judicially negated as violative of the equal protection clause of the Fourteenth Amendment to the Constitution. Yet the City of McComb will effectively accomplish these same results if this ordinance is permitted to stand.

At the hearing and in the state court opinions, reliance was placed upon the cost of supplying sewage facilities to the Negro community of "Beartown" as compared to the relatively small tax revenue supplied by the residents of that area to the City of McComb (R. 60). Aside from the fact that poverty of citizens does not justify depriving them of their citizenship, this argument runs afoul of this Court's decision in *Watson* v. *Memphis*, 373 U. S. 526 (1963), where it was stated at page 537:

> [V]indication of . . . constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them.

This brief analysis of the evidence intended only to illustrate the weakness of the decision of the court below is not a necessary prerequisite to finding the proposed ordinance unconstitutional. However, "reasonable" the ordinance may appear on its face, when, in application, or in effect, it operates to deprive citizens of their constitutionally protected rights it must fail. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354 (1951); *Boynton* v. *Virginia*, 364 U. S. 454 (1960).

3. In its decision the court below has departed from its own construction of controlling law. *Forbes* v. *City of Meridian*, 86 Miss. 243, 38 So. 676 (1905); *Town of Crystal Springs* v. *Moreton*, 131 Miss. 77, 95 So. 242 (1923); *Dodd* v. *City of Jackson*, 238 Miss. 372, 118 So. 2d 319 (1960); *Ritchie* v. *City of Brookhaven*, 217 Miss. 860, 65 So. 2d 436; *In Re Extension of Boundaries of the City of Meridian*, 237 Miss. 486, 115 So. 2d 323 (1950); *Parker Gin Corporation* v. *Town of Drew*, 214 Miss. 147, 58 So. 2d 372 (1952); *In the Matter of the Extension of the Boundaries of the City of Philadelphia*, 232 Miss. 582, 100 So. 2d 100 (1958); and *Kennedy* v. *City of Kosciusko*, 204 Miss. 4, 33 So. 2d 285 (1948).

The factors considered by the Supreme Court of Mississippi in rendering its decision that the ordinance in question was reasonable, consistent with the statutory requirements, were not proper for consideration under their own construction of the law. Moreover, the failure of the court below to consider the effect of deannexation on the residents of the area involved and provision of a unique rendition of the law specifically for this case contrary to its own repeated principles is inconsistent with petitioners' rights to due proces of law under the Fourteenth Amendment. See *Forbes* v. *City of Meridian, supra; Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 682 (1930); *Davis* v. *Wechsler*, 263 U. S. 22 (1923); *In re Murchison*, 349 U. S. 133 (1955); and *Thompson* v. *Louisville*, 362 U. S. 199 (1960).

4. The constitutional deprivations suffered by petitioners were further aggravated by the Chancery Court's denial of petitioners' motion to desegregate the courtroom made at commencement of the hearing. In *Johnson* v. *Virginia, supra*, this Court stated:

> [I]t is no longer open to question that a State may not constitutionally require a segregation of public facilities . . . State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of the laws.

See also *Wood* v. *Vaughn*, 321 F. 2d 480 (4th Cir. 1963). In this case, although the segregated courtroom may not have resulted from an explicit court order, the court's denial of petitioners' motion to end the segregation constitutes "state action" of a prohibited nature. *Cf. Shelly* v. *Kraemer*, 334 U. S. 1 (1948).

The effects of a segregated courtroom bear a striking similarity to those in *Estes* v. *Texas*, 33 USLW 4543 (decided June 2, 1965). In that case, the presence of television cameras in a courtroom during the trial was found likely to impair the quality of testimony, place unnecessary

responsibilities upon the trial judge and subject the defendant to a "form of mental—if not physical harassment . . ." In the case at bar, petitioners, their attorneys, and certainly the trial judge who denied the motion to desegregate, were subject to similar adverse affects. Petitioners, all of whom are Negroes, were required to try a case based upon racial discrimination in a segregated atmosphere precluding any fair hearing and before a judge whose refusal to effectuate compliance with the law is racial bias or, at best, rigid and injudicious adherence to racial segregation. Assuming the court exercised its judicial duties with the highest degree of impartiality of which it was capable, the fact that this "impartiality" was exercised in a courtroom in which the existence of racial apartheid was so obvious, renders questionable the judge's ability to function fairly in a case of this nature.

A hearing before the Chancery Court is the only opportunity citizens affected by proposed annexation and deannexation ordinances in Mississippi are afforded. Mississippi Code of 1942, Ann. § 3374-10(f), *supra,* p. 2. Accordingly, it is all the more important that such a hearing be conducted with full recognition of petitioners' constitutional rights. Subjection to the humiliation of a segregated courtroom negates the disposition of the equal justice under law which the judiciary is required to provide, permeates the entire proceeding, prejudices petitioners' rights and requires remedial action by this Court.

There was throughout the proceedings below the implicit presence of the racial inferiority of petitioners as an accepted and judicially approved concept. No valid determination can emanate from such an abuse of judicial process.

It is thus a matter of grave public importance that this Court grant certiorari so that it may determine whether petitioners could have and in this case did receive from the

state courts an unbiased and thorough examination of the constitutional issues which they raised and to which they were entitled under the due process clause of the Fourteenth Amendment.

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that this petition should be granted.

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APPENDIX

Opinion of Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 43,276

THOMAS J. MARSHALL ET AL.,

v.

MAYOR AND BOARD OF SELECTMEN OF THE CITY OF McCOMB CITY, MISSISSIPPI.

ETHRIDGE, *Justice.*

The Mayor and Board of Selectmen of the City of McComb City, Mississippi adopted an ordinance to contract the corporate boundaries, by excluding and detaching certain parts of territory incorporated in 1961. As required by statute, they filed a petition with the Chancery Court of Pike County for approval of such contraction. Thomas J. Marshall and others, appellants, filed objections, and after a hearing the trial court entered a decree finding that the proposed detachment was reasonable, and was required by the public convenience and necessity. The pertinent statutes make these the criteria for an enlargement or contraction of city limits. Miss. Code Ann. § 3374-10 to 3374-13 (1956). The questions here are (1) whether this finding is supported by the evidence, and (2) whether the contraction was based on racial discrimination and thus is violative of the fourteenth and fifteenth amendments to the United States Constitution. We answer (1) in the affirmative, and (2) in the negative, and affirm the decree.

Essentially, extension or contraction of municipal boundaries is a legislative action, reviewable by the courts under certain tests but delegated by the legislature to the municipal governing authorities. In contrast with the general requirements of the Mississippi act, many other states, in providing for detachment of a territory from a municipality, prescribe certain facts or conditions which must exist in order to authorize detachment. 2 McQuillin, *Municipal Corporations* § 7.27 (1949); 62 C. J. S. *Municipal Corporations* § 48 (b) (1949).

I.

The City of McComb City, situated in Pike County, has a population according to the 1960 census of 12,000. In April 1961, it expanded its municipal boundaries by adding 1150 acres on its south and southwest sides. The ordinance, passed in September 1960, stated that the city proposed to furnish water and sewage facilities within the added territory, when required by its occupants, and fire and police protection, garbage collection, school facilities, and other municipal facilities "now being furnished to occupants of property within the corporate limits." This expansion was approved in April 1961.

In August 1963 the city by ordinance contracted the municipal boundaries by detaching a portion of the new territory, added in 1961, removing from it approximately 350 acres on the extreme south side of the added territory, south of Highways 24 and 98. The ordinance stated:

> The City of McComb City proposes to contract the City limits as herein proposed because it has become evident that the facilities offered the residents of this excluded area cannot be furnished within a reasonable time as was indicated when this area was incorporated within the City, April 29, 1961.

That if the said City attempted to provide water and sewer facilities in addition to fire, police protection, garbage collection, and other municipal facilities, all of the citizens of the city would be unduly burdened, and that public convenience and necessity is required and would be served by the contraction of the City limits as proposed herein.

After the city filed its petition for approval of the contraction, appellants, Thomas J. Marshall and forty-five others, objected. They denied that McComb could not furnish within a reasonable time the facilities described in the 1961 ordinance, and that public convenience and necessity would be served by the contraction. They made these claims: They had a vested interest in the city, because they had been paying taxes since the incorporation. The proposed contraction was disciminatory, since "most of the residents" proposed to be detached were Negroes, and most of the others who were incorporated but remained in the city are white. It discriminated against appellants, who are Negroes, because of their race, contrary to the equal protection and due process clauses of the fourteenth amendment, United States Constitution. Some of the objectors at great expense had made improvements to their properties in anticipation of eventually receiving all city services. Police protection and zoning regulations would be withdrawn from them, they would be without sewage and sanitation facilities, and would be deprived of effective participation in municipal affairs of the city, in violation of the fifteenth amendment.

The chancery court found that it would take a bond issue of $454,000 to bring city facilities, such as water and sewerage into this area. The city received only $3400 a year in taxes out of this 350 acre area. The ordinance was reasonable and required by the public convenience and necessity. The governing authorities of the city have the duty to con-

sider the welfare of all of its citizens, and the evidence showed that it "cannot extend water and sewage to the area in question without jeopardizing the duty and obligations the city owes to other areas of the city which have been a part of the city for many years."

The trial court said that, although an attempt had been made to inject the race issue, "the proof shows there is no foundation for that attempt. My decision would be the same regardless of who the objectors may have been." The objections filed by appellants "were not supported by the evidence and should be overruled." The detached area will not suffer any unreasonable or substantial loss, will be provided adequate police and fire protection by the sheriff's office, and the school children will not be affected. The detached area is not needed for expansion, and is not in the path of expansion. The city does not have the financial resources for expenditures of $454,000 and will not have them in the foreseeable future. Providing the facilities in the excluded area would be more expensive than in other parts of the city containing a like amount of area. They cannot be provided in the foreseeable future without unduly burdening all of the inhabitants of the municipality. Hence the decree approved the ordinance.

The virtually uncontradicted evidence offered by appellee supports the finding of the trial court that the detachment of the 350-acre tract was reasonable and was required by the public convenience and necessity. The objectors failed to offer any tangible evidence that the city was either motivated by racial considerations or that in fact acted for reasons of race. The evidence not only fails to support but contradicts this argument made by appellants.

Gordon Burt, Jr. had been mayor of McComb since January 1963. Before enactment of the ordinance, he and the board of selectmen studied the matter for six months. The city engineer, J. E. Carruth, was directed to make

cost estimates for extending full city facilities to the detached area. After this study, the mayor and board concluded that the financial condition of the city and the projected cost prevented extension of city facilities to this area within the foreseeable future. The north boundary follows the natural physical boundaries of the streets as lines of demarcation. The detached area is not needed for growth of the city. Other areas are available and needed for growth. The city has been expanding in a westerly direction, not south, and it is ample for future expansion.

Of the 350 acres, the city owns 50 acres, containing a sewage lagoon. The McComb Separate School District has 20 acres upon which a school was located before the 1961 annexation, and to which the district built a water line before 1961. In the west portion and the extreme south edge, there is additional open land, aggregating 70 to 80 acres. The city can extend full services to those remaining in the city after detachment without substantial cost. The detachment will not interfere with school children participating in schools of the separate school district. No changes would be made, except that when children are outside of the city limits they are entitled to bus transportation to school, if over one mile away. The mayor said that the only question considered was the econmic feasibility of extending municipal services to the detached area. The city would continue to furnish fire protection to it. Before annexation, law enforcement by the sheriff was adequate.

The city does not have financial resources, the mayor said, to spend on the detached area. It is under an obligation to make improvements where there is a definite expansion. Provisions of water and sewerage would be difficult and expensive, because construction of long pipelines to serve a few people would be uneconomical, and the elevation of the land would render sewage pipes disproportionately expensive. In the preceding year the detached area produced only $3400 in taxes. It contains persons of both races. The annexed part remaining in the city contains 119 Negro

property owners and 103 white property owners. The area known as Algiers, to be retained, is predominantly Negro. Part of the detached land is predominantly white. The mayor and board concluded that within a reasonable time the city could not supply the tract with facilities. The detachment does not withdraw any sewer or water services, because they are not now being rendered. It will not affect any zoning ordinance, since it has not been enforced in this area. The millage rate of the city was reduced from 47 to 37 mills, because the electorate voted to impose a sales tax of ½%, which replaced the reduction in ad valorem millage.

In the middle 1950's, the city issued bonds of $850,000. As of September 1963, $723,000 were outstanding. Annual retirement payments on them increase every year by $2,000, and with 21 more years for amortization they have become a serious burden upon the city. Increased payments were based upon an anticipated increase in revenue, but that has not developed. In 1960 the city issued bonds of $150,000 to construct a sewage lagoon in the southwest part of the area in question. The engineering estimate of the cost to provide water and sewage facilities for the detached area is $454,000. The city has never spent that amount of money on so small an area. It would put an undue burden upon other citizens, since the area remaining after detachment will require all available revenue. The 1961 expansion was not recommended by the city planning board.

The separated area has some graveled streets, and some parts of it are fairly thickly populated. The homes there use either septic or sanitary closets for sewage. The city's water and sewer department was operating at a deficit when Burt assumed office in 1963. Part of the detached area is called "Beartown," a large majority of whose residents are Negro, but there are also many white residents. The Algiers district, not adjacent to the detached area, is predominantly Negro, and if the city had been drawing lines on a racial basis, it could have been detached without

affecting the symmetry of municipal boundaries of the city, but that was not done. The streets in the detached tract were built by the county, before the 1961 annexation, and were maintained by the county. R. R. Warren, Sheriff of Pike County, testified that if the area was detached, his office would provide it with adequate law enforcement.

A petition with 111 signatures was filed with the mayor and board by persons living in the detached area, requesting removal from the city limits. M. J. Statham said that he circulated the petition for only a few hours, obtained the signatures with no difficulty, and around 60% of them were Negro.

J. E. Carruth, city engineer, designed and supervised construction of McComb's sewer and water systems. He estimated the cost of providing sewer, water and street facilities for the detached area would be $454,000. It has practically none at present. Its topography greatly increases the cost of sewage lines, because a ridge through it divides the drainage between west and east. Elevated water storage would also be needed. All of this would require at least two pumping stations for sewage disposal, in order to serve the east side of the ridge. Sewage would have to be pumped under the railroad to flow into the existing disposal plant. A complete reconstruction job would be necessary for the streets. Moreover, there are several districts within the old corporate limits which do not have but need sewerage and water. There has been a recent extension of the city limits to the north, where there are both colored and white residential areas without city facilities. Several subdivisions are being developed within the old city limits.

Four witnesses testified for objectors. They resided in the detached area, and were Negroes. They said they wanted to remain in the city limits, and were willing to wait for full municipal services until such time as the city could afford them. They thought remaining in the city

would furnish better police protection and streets, and garbage collection. At the present they are not receiving city water and sewage facilities. They objected to being moved from the city also because they could not vote in municipal elections. It was stipulated that thirteen other persons would testify substantially in the same way. Although counsel for appellants stated on the argument that there were 2500 residents in "Beartown," which is in the detached area, the record is silent as to its population.

II.

The evidence offered by the city in support of the proposed detachment is virtually uncontradicted. The questions are whether there is any reasonable basis for the ordinance, and whether the evidence reflects public convenience and necessity. We answer both in the affirmative. The contraction is essentially a legislative function, but subject to judicial review on these issues. Dodd v. Jackson, 238 Miss. 372, 118 So. 2d 319 (1960); In re City of Philadelphia, 232 Miss. 582, 100 So. 2d 100 (1958).

In summary, the ordinance to detach this land was based upon certain undisputed facts: The area is difficult to service with water and sewerage, because of topography and other physical characteristics. It cannot be developed without making the balance of the city suffer, and is not needed for future expansion. The city is financially unable to comply with the 1961 ordinance expanding the city limits and taking in the detached area. To develop it would financially overburden McComb. The symmetry of the city boundaries are not disturbed by the new line. Moreover, expansion of McComb is to the west and north, not south, and demands for services are principally in those other areas. The city provided no water and sewer service to the detached land during the two years it was in the city limits.

No zoning regulations were applied in that interim to the area, which would be left in the same condition as it was when taken into the city. The detachment would not result in loss of police or fire protection, nor would unsanitary conditions arise because of the detachment. School children would not be affected. Existing streets were built by the county. These and the other substantially undisputed facts in the record support the decree upholding the ordinance.

The other two detachment cases from this jurisdiction upheld the validity of ordinances excluding certain territory. Wheat v. Town of Poplarville, 149 Miss. 424, 115 So. 559 (1928); Thomas v. Town of Long Beach, 111 Miss. 329, 71 So. 570 (1916). The severance of land from municipal corporations depends largely upon the provisions of the statute in its application, taking into consideration the location and characteristics of both the municipality and the land. It comprehends the symmetry of the city, the difficulties of administration, economic problems, and planning improvements. 2 McQuillin, Municipal Corporations § 7.27 (3d ed. 1949). And the fact that land sought to be detached may have received benefits from a municipality does not bar its detachment. Van Bebber v. Village of Scottville, 13 Ill. App. 2d 458, 142 N. E. 2d 711 (1957); 1 Yokley, Municipal Corporations § 35 (1956). Where a certain area in a town has no proper relationship to its future growth, and receives no substantial benefits, its detachment may become proper. Town of Medley v. Seminole Rock Products, Inc., 138 So. 2d 534 (Fla. App. 1962); Howard v. North Salt Lake, 7 Utah 2d 278, 323 P. 2d 261 (1958).

Some of the criteria available for city authorities in determining whether to detach territory, particularly if the same has recently been added to it, arise where no improvements have been made by the municipality, the symmetry of the city will not be marred by the detachment, and extending full city services to the area would place upon

the municipality an economic burden wholly out of proportion to the needs of the citizens of the city as a whole, and not commensurate with the economic resources and revenue of the municipality. 37 Am. Jur. *Municipal Corporations* §§ 35-39 (1941); 62 C. J. S. *Municipal Corporations* § 48 (1949); Annot., 117 A. L. R. 271 (1938).

Moreover, where the right to a severance of territory from a municipal corporation is a continuing one, estoppel may not be asserted as a defense to it. 62 C. J. S. *Municipal Corporations* § 48 (c); Annot., 101 A. L. R. 581 (1936). Apparently the 1961 extension of the municipal limits into the detached 350 acres was the result of a mistake made by the mayor and board of selectmen at that time, and the present ordinance is an attempt to rectify that error. Where the corporate limits of a city have been unreasonably extended, a part of the territory may be detached. Wheat v. Poplarville, 149 Miss. 424, 115 So. 559 (1928); Thomas v. Long Beach, 111 Miss. 329, 71 So. 570 (1916); Annot., 62 A. L. R. 1011, 1033 (1929).

In short, the facts reflect a rational basis for the decision of the mayor and board. Whether the contraction is a wise step, and whether it supports the best, long-term interests of McComb are not judicial questions, but issues for the governing authorities of that city.

III.

Appellants also assert that since they were in the municipal for about two years, they have now acquired a "vested interest in the city," and to now take that from them would be to deprive them of property without due process of law, contrary to the equal protection and due process clauses of the fourteenth amendment, United States Constitution. If this contention were valid, a city could never contract its limits, although it had not extended any substantial

municipal facilities to the area and was financially unable to service the new territory, without disregarding the interests of all of its other inhabitants. Where reasonable and required by public convenience and necessity, the right to a severance of territory from a municipal corporation is a continuing right, and estoppel may not be asserted as a defense to it. 62 C. J. S. *Municipal Corporations* § 48 (c) (1949); Annot., 101 A. L. R. 581 (1936).

Appellants further claim that the contraction discriminates against them because of their race, contrary to the equal protection clause of the fourteenth amendment; and that it deprives them of the right to vote because they are Negroes, in violation of the fifteenth amendment to the Constitution of the United States. The record does not support these arguments. It fails to show that the mayor and board of selectmen were either motivated by racial consideration or in fact detached the territory on racial lines or for those reasons. The evidence reflects that the city authorities concluded they made a mistake in extending the city limits two years before; that the city with a heavy bonded indebtedness was not able to extend municipal services to this 350-acre tract, because its topography and the distances involved required unusually expensive extensions to a limited area, contrary to the best interests of other citizens of the city.

Gomillion v. Lightfoot is not applicable. 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). That case was decided on the basis of allegations in a complaint. The Alabama Legislature altered the shape of the City of Tuskegee from a square to a 28-sided figure, and removed from the city all save a few Negro voters, but no white voters. It was held that on its face the statute was invalid because it violated the fifteenth amendment, which prohibits a state from passing any law depriving a citizen of his vote because of his race. Here the mayor and board of selectmen received a petition from 111 residents of the de-

tached area, requesting detachment. Sixty percent of them were Negroes. A majority of those remaining in the 1961 annexed territory, after the detachment, are Negroes. Adjacent areas, such as Algiers, which are principally Negro remained in the municipality. These and other facts negative appellants' assertions of racial discrimination. Moreover, appellants did not offer any other evidence of a different nature to show discrimination because of race, or any motivation to exclude Negroes as voters.

Wright v. Rockefeller, 376 U. S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964), upheld a New York statute apportioning congressional districts lying in New York County. The Court affirmed the trial court's holding that the districts were not the product of a state contrivance to discriminate against colored voters; and that plaintiffs failed to prove the legislature was either motivated by racial considerations or in fact drew districts on racial lines. In the instant case, as in *Wright,* the crucial factual issues fail to support the contentions of appellants. See Taylor v. Township of Dearborn, 370 Mich. 47, 120 N. W. 2d 737 (1963).

Affirmed.

LEE, C. J., and BRADY, PATTERSON and INZER, JJ., Concur.